
U.S. Department of Labor
Office of Administrative Law Judges
1111 20th Street, N.W.
Washington, D.C. 20036

DATE ISSUED: JUL 24 1991
CASE NO. 87-ERA-23

In the Matter of

CHARLES HILL, ET AL.,
Complainants,

v.

TENNESSEE VALLEY AUTHORITY,
Respondent.

Appearances:

Lynne Bernabei, Esq.
Debra S. Katz, Esq.
For Complainants

Brent R. Marquand, Esq.
Thomas C. Doolan, Esq.
For the Respondent

Miles S. Weiss, Esq.
Pro Se

Before: NICODEMO DE GREGORIO
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case concerns a complaint of discrimination filed by 23 employees pursuant to Section 210 of the Energy Reorganization Act of 1974, as amended, 42 U.S.C. § 5851 (ERA), and implementing regulations at 29 C.F.R. Part 24 (1990). The Act prohibits

covered employers from discriminating against any employee with respect to terms, conditions, or privileges of employment because the employee assisted or is about to assist in any action to carry out the purposes of the Energy Reorganization Act or the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2011.

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Procedural History of the Case

Charles Hill, Austin L. Elliott, Charles A. Daley, Oscar Curry, Earl R. Peterson, Kay E. Stephens, Edwin Chauvin, Jr., Dorothy Nixon, Stephen P. Hans, Michael Mills, Michael R. Lannigan, Donald Roberts, Linus C. Issinghoff, Patricia Turner, James Sallee, Ted Hough, Teresa Swain, William Lockwood, Roger Bird, Timothy Kulp, William R. Pickering, Michael Shannon, and Miles S. Weiss (Complainants) are former employees of Quality Technology Company (QTC). In May 1985, QTC entered into a contract with Tennessee Valley Authority (TVA) o develop and implement a program for the identification, investigation, and reporting of issues raised by TVA's employees, with special emphasis on issues concerning the safety of TVA's nuclear facilities. On or about October 16, 1986, Complainants filed a complaint of discrimination against TVA. The complaint alleges that TVA violated the ERA when it significantly narrowed the scope of the TVA-QTC contract and eventually refused to renegotiate the contract, thereby causing the termination of Complainants, employment with QTC, in retaliation for QTC's investigation, corroboration, and public disclosure of nuclear safety-related problems disclosed by TVA employees.

On December 1, 1987, Administrative Law Judge John M. Vittone issued a Recommended Order, recommending dismissal of the complaint. Judge Vittone held that the ERA protects employees only against discrimination by their own employer. Finding that Complainants were employees of QTC, not of TVA, Judge Vittone concluded that he had no jurisdiction over Complainants, complaint against TVA.

By Decision and Order of Remand, dated May 24, 1989, the Secretary of Labor remanded the case for further proceedings. The Secretary held that the ERA forbids a covered employer to discriminate against any employee, even one other than its own. The Secretary concluded that Complainants could file claims of discrimination against TVA, and that on remand it would be their burden to prove "that any unlawful discrimination occurred in connection with TVA's restriction and subsequent refusal to negotiate the contract with QTC." Secretary's Decision and Order of Remand issued May 24, 1989, at 10.

On remand, after a period of extensive discovery by the parties, a hearing was held on 19 days during the period from June 19, 1990 to November 1. 1990. Three stipulations of the

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parties augment the hearing record. A Statement of Agreed Facts was filed with Judge Vittone on July 27, 1987. After the hearing, the parties filed a Stipulation dated November 1, 1990, and a Second Stipulation dated November 9, 1990. All three stipulations are accepted, and all matters stipulated to are made part of the record of the case. The parties have also filed post-hearing briefs, which I have found very helpful.

Statement of the Case

1. The Tennessee Valley Authority (TVA) is a wholly owned Federal corporation created pursuant to the Tennessee Valley Authority Act of 1933, 16 U.S.C. § 831-831dd. In 1985, TVA held operating licenses from the Nuclear Regulatory Commission (NRC) for five nuclear power units, as well as construction permits for four additional units.

During April 1985, when TVA was about to obtain an operating license for Watts Bar, NRC notified TVA that TVA employees had raised a number of safety concerns anonymously with NRC and congressional staff. The concerns related particularly to the nuclear plant under construction at Watts Bar. The employees had also expressed fear of retaliation, should they disclose their concerns to TVA management. NRC, in turn, expressed its concern that because TVA employees were fearful of possible reprisal, TVA management was not being informed of potential safety problems. For this reason, NRC recommended that TVA hire an outside contractor to interview TVA employees, so that their safety concerns might be identified, investigated, and resolved.

On May 10, 1985, TVA entered into a one-year personal services contract with Quality Technology Company to develop and implement a program for the identification, investigation, and reporting of employee-raised issues, with special emphasis on issues dealing with nuclear safety. Quality Technology Company (QTC) was a partnership organized under the laws of Kansas, which provided consulting and investigative services throughout the nuclear power industry. QTC was selected over another contractor, Safeteam, on the basis of its successful performance of similar work at other nuclear plants, notably Wolf Creek and Waterford.

The contract, designated as Contract No. TV-66317A, was

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for the term of one year, retroactive to April 26, 1985. It was originally funded for an amount not to exceed $3.6 million. However, because the concerns expressed by TVA employees greatly exceeded expectations, the contract was modified through three supplements in June, September, and October, 1985.

2. At the time of the execution of the TVA-QTC contract, TVA already had two internal organizations performing investigations of employee concerns. The Nuclear Safety Review Staff (NSRS) was composed of nuclear engineers who conducted safety reviews of TVA's nuclear plants, and reported directly to TVA's Board of Directors and

the General Manager. NSRS was independent of line management, e.g., site directors of nuclear plants, and acted as watchdog over TVA's nuclear program. TVA's Office of the General Counsel (OGC) was the other organization with investigatory responsibilities. OGC investigated concerns relating to employee intimidation and harassment (I+H) or employee misconduct.

3. The QTC contract stipulated that QTC would render services when and as requested by the Director of NSRS. The contract required QTC to conduct interviews of all TVA employees assigned to the Watts Bar Nuclear Plant, in such a way as to provide each employee an opportunity to express in confidence any concern about safety at Watts Bar Nuclear Plant; to develop and implement procedures to insure that the identity of persons expressing concerns would be kept confidential; to establish priorities and categories of concerns as to subject matter, in accordance with guidelines established by the Director of NSRS, and to report them to TVA; upon request of the Director of NSRS, to conduct investigations of issues of concern or assist TVA personnel in making investigations; to provide full written reports of its investigations; and, upon approval of a report by TVA, to report the results of the investigations, including any action or response by TVA, to the employees who expressed the concerns.

The central purpose of the contract was to interpose QTC, an outside organization, between TVA, which needed to resolve safety concerns as a condition for obtaining operating licenses from NRC, and TVA's employees, who were reluctant to disclose their concerns directly to TVA because of their fear of retaliation. The contract contemplated that QTC would elicit expressions of concerns from TVA: employees by promising them

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confidentiality, and assist the limited staffs of NSRS and OGC by conducting investigations of safety and I + H concerns, as requested by NSRS or OGC.

4. QTC started to work for TVA in the third week of April 1985, pursuant to a letter of intent, and before the contract was signed. QTC developed an employee concern program identified as the Employee Response Team (ERT), whose primary mission was to identify employees' concerns about the safety of TVA nuclear reactors and about compliance of TVA reactors with Federal regulations. During the first three weeks on the contract, comprehensive procedures for conducting interviews, investigating employee concerns, and reporting to TVA management were developed by QTC and approved by NSRS. also recruited and trained necessary personnel. Complainants in this case were employed under the contract in the capacities of interviewers, investigators, and administrative or clerical support personnel. By the terms of the contract, TVA had the right to review the qualifications of any QTC employee prior to his assignment to perform services under the contract; upon the exercise of this right, the assignment could be made only with TVA's approval.

After the first month of interviews it became apparent that the employees' responses to the program far exceeded the expectations of TVA and QTC. Owen L. Thero, President and Chairman of the Board of QTC, testified that about 30 to 40 percent of TVA employees interviewed expressed concerns, while on past projects the concern rate had been six percent. Thero, Tr. 111 & 125. For example, by June 7, 1985, QTC had interviewed about 1700 employees, and received about 1000 concerns. The multitude of employee concerns was a serious problem for TVA because the concerns were a licensing issue; a roadblock in the way to licensing Watts Bar. Thus, the emphasis of the ERT program shifted from interviews to investigations. Moreover, TVA and, consequently, QTC were under pressure to devise methods for accelerating the investigations and resolution of the I + H concerns. In October 1985, funding for the TVA-QTC contract was increased by $2.0 million, and QTC hired additional investigators.

5. NRC, charged with responsibility to assure public health and safety, was well aware of the crisis in TVA's nuclear program, and monitored TVA's "recovery" program. In July 1985, NRC conducted a programmatic review of the ERT program put in

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place by QTC. NRC inspected procedures, reviewed the qualifications of QTC employees, and examined the documents generated by the program. In August 1985, NRC issued an inspection report, that was generally favorable to QTC. CX-58. Also favorable was NRC's Systematic Assessment of License Performance (SALP) Report of September 17, 1985. See CX-86, at 7-8. During this period, William Ward, Chief of the Investigations Branch in NRC's Office of Inspection and Enforcement, followed the developments at TVA through conversations with Mr. Thero, President of QTC, and Charles C. Hill, one of the Complainants. Mr. Ward knew Messrs. Thero and Hill from their previous work at another nuclear plant, and received information from them, concerning the state of TVA's nuclear program and QTC's activities and findings. In addition, the Director of Nuclear Reactor Regulations and a staff member of NRC's Region II met with Mr. Hill at Watts Bar in September 1985 for information about concerns generated by the ERT program.

6. NRC was not the sole public agency to have an interest in the state of the TVA nuclear program. Members of Congress from districts served by TVA, as well as members of Congressional oversight committees, were also concerned. Thus, on September 19, 1985, Mr. Thero and Scott Schum, one of the principal officers of QTC and Program Manager at TVA, made a presentation about the ERT program to Congressman James Cooper the House members of the Tennessee Valley Authority Caucus, and to the staffs of a number of Congressional committees. The briefings included a summary of the kind,and number of issues identified through employee interviews. TVA's Board of Directors, the Head of TVA's Nuclear Safety Review Staff, and the Manager of TVA's Office of Nuclear Power also attended the Caucus meeting. CX-91, at 6.

7. The safe operation of nuclear plants depends to a large extent on the timely discovery and correction of conditions with a potential for disaster. Workers employed in the construction or operation of a nuclear plant are an important source of information with regard to the existence of possible safety risks. They are likely to be better informed about possible defects than their managers who are not directly involved in the many activities that go into the construction or operation of a plant. Thus, the ERA encourages employees to disclose potential dangers to their own employers, as well as the NRC, by providing

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protection against reprisal.

The purpose of an employee concern program at a nuclear utility is to provide a confidential channel for the expression of employees, views and concerns. Before QTC was hired to establish its ERT program, TVA had its own employee concern program which, however, had proved ineffective. Nonetheless, neither TVA nor QTC viewed the QTC-run program as a long-term solution to the problem of communicating employee concerns to management. Thus, on October 31, 1985 William E. Mason, TVA's Assistant General Counsel for Personnel and Administrative Matters, met with Messrs. Schum and Thero to discuss a TVA plan for taking over the function of the ERT program at Watts Bar. CX-144. A "sort of consensus phase-out plan" was reached, which contemplated that on December 1, 1985, administration of the QTC contract would be transferred to TVA's Inspector General; that at Watts Bar "TVA employees would begin to infiltrate the ERT, replacing QTC employees totally by the end of the 1986 fiscal or r calendar year", and that QTC would provide backup assistance. CX-144, at 2. On November 20, 1985, TVA submitted its Employee Concern Program to NRC. CX-169. The implementation of the program at Watts Bar was not intended to change the activities associated with the receipt, investigation, or closure of employee concerns brought to QTC as part of interviewing employees at Watts Bar. *Id.*, at 008474. In fact, QTC would continue to provide walk-in and exit interviews until January 1986. During the period from December 1, 1985 to January 1, 1986, NSRS was expected to participate with QTC in the interview process. The new plan was designed to become operational on February 1, 1986, under the direction of an ECP Manager who reported directly to the Manager of Power and Engineering (Nuclear). A separate contract was negotiated, under which QTC would assist in the implementation of the new, TVA-run ECP program. The term of the contract was from November 21, 1985 to April 30, 1986, and total payments under the contract were authorized up to $635,000. CX-245.

8. On December 13, 1985, the NRC issued a report of an inspection conducted during September 30 to October 25, 1985, and focused on activities related to the Employee Response Team Program. CX-213, at 700715. The report noted that most of the employee interviews had been completed. As of the inspection period, 113807 employee concerns had been obtained through the interview, phone-in, and walk-in" processes, of which 1330 had

been preliminarily determined to be safety-related. CX-213, at 700719. Of these, approximately 1100 had been referred to NSRS for review and assignment to itself or QTC for investigation. *Ibid*. Preliminary investigations of only 91 concerns had been completed and forwarded to TVA line organizations for their response and determination of any corrective actions required. No concern had progressed to the point of completion of corrective action(s). *Ibid*. The NRC was concerned with management control of the overall program.

9. Frustrated at the lack of progress in closing out employee concerns, and under mounting criticism from NRC, TVA managers considered reorganizing the employee concern program. On December 17, 1985, W.F. Willis, TVA's General Manager, together with other managers-met with W.S. Schum and Owen Thero to discuss the new plan. Under the proposal, a Management Review Group (MRG) would be formed to review safety concerns, determine adequacy of investigations, and formulate corrective actions. Mr. Schum would be a voting member of the MRG. QTC would receive and classify ERT concerns, manage the investigative team activities, and provide responses to concerned employees. RX-29. Mr. Willis requested written comments on the draft logic and draft table of responsibilities discussed at the meeting. *Ibid*. The entire program was to be placed under the control of William T. Cottle, the site director of the Watts Bar plant and Assistant Manager of Nuclear Power. *See* RX-29, 29A; Thero, Tr. 353.

In response, QTC submitted a contract proposal to Mr. Cottle on December 27, 1985. The proposal was to investigate approximately 1200 safety-related concerns, with a completion date of June 15, 1986, at an estimated cost of about 11.5 million. RX-32. The proposal called for 50 additional investigators (not including I+H investigators), in addition to some NSRS assistance. While promising cooperation with Mr. Cottle's organization, the proposal made clear that QTC considered it necessary to report directly to the General Manager or the Board of Directors, in order to maintain employee confidence in the ERT program. *Ibid*.

10. The problems besetting TVA's nuclear power plans were reported in trade publications and NRC bulletins. Managers and consultants in the nuclear power industry became concerned that TVA's troubles would have repercussions on the entire industry,

that other nuclear plants would be subjected to closer scrutiny by NRC. In order to get a better understanding of TVA's situation and determine their own capacity to offer assistance, Edward J. Siskin, Executive Vice President of Stone & Webster Engineering Corporation (SWEC), William Wegner, a principal in Basic Energy Technology Associates (BETA), Steven A. White a retired admiral with a financial interest in SWEC, and others met with TVA managers in Chattanooga, Tennessee, in October 1985, *See*

Siskin, Tr. 3922. TVA managers expressed dissatisfaction with the ERT program administered by QTC. Hugh Parris, Manager of the Office of Nuclear Power, complained that QTC was finding too many problems, reported them in a way that made them look serious, and that QTC was a cancer. Siskin, Tr. 3905, 3925; Wegner, Tr. 3427-28. Mr. Siskin understood Mr. Parris' comments to mean that QTC would prove fatal to TVA's nuclear program unless it was cut out. Siskin, Tr. 3927-30; *see also* Cottle, Tr. 2793-95.

The Chattanooga meeting was followed by an inspection and an assessment of TVA's nuclear facilities from November 12-22, 1985. Mr. White and Mr. Wegner were together most of the time in conducting their part of the inspection. Again, there we complaints from TVA's managers that QTC's identification of safety problems was harmful, not helpful, to TVA; that QTC invented problems where none existed; and that QTC was reporting safety problems directly to NRC and Congress. Wegner, Tr. 3426-30, 3438-40; Siskin, Tr. 3930-31. In sum, according to Mr. Wegner, in numerous discussions with TVA top managers, QTC came up repeatedly, spontaneously, and unfavorably. Wegner, Tr. 3414, 3427-28, 3431. The inspection team interviewed only managers in line organization; they did not speak to members of the NSRS, nor to employees of QTC. *See* Wegner, Tr. 3420-21.

11. In October 1985, TVA's Board of Directors determined that in order to resolve the crisis in its nuclear program it needed to hire an outside expert, a "nuclear czar", with direct authority and responsibility over the operation of TVA's entire nuclear program. *See* CX 551, at 1. Following a course of negotiations, the Board signed an agreement for Mr. White's services as Manager of the Office of Nuclear Power (ONP). The contract and a related Memorandum of Understanding (MOU) were executed on January 3, 1986, at the TVA hangar at the Knoxville Airport. The MOU gave Mr. White authority to hire, remove,

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assign, or direct any personnel supplied by outside contractors, and any TVA personnel engaged in the nuclear power program activities, subject to approval of the Board of Directors with respect to senior TVA managers. In short, Mr. White was granted power coextensive with his intention to restructure TVA's entire nuclear organization so as to bring all nuclear activities and personnel under direct control of his own office. NSRS, to QTC reported employee concerns and for which it conducted safety investigations, was specifically reassigned to Mr. White's supervision.

12. Steven White assumed the duties of Manager of the Office of Nuclear Power on January 13, 1991. He arrived with a group of close advisors; including Messrs. Wegner, Brodsky, and Siskin. On the same day, a draft letter to QTC was discussed with OGC. The draft was sent to Mr. White on January 14th. CX-561. The second paragraph of the draft letter, which was prepared for Mr. White's signature, recited that, before going to TVA, Mr. White had spent some considerable time studying TVA's nuclear activities; that the employee concern efforts were too dispersed, insufficiently focused on safety

issues, and not appropriately integrated into the ONP operations; and that it was essential that TVA employees have responsibility for the employee concern effort. CX-561, DD001364. The fifth paragraph would have advised Mr. Schum that QTC investigators should complete ongoing investigations of safety-related concerns by February 1986 and that thereafter no new safety-related investigations should be started by QTC without specific direction from Mr. White or some official not designated in the draft. *Id*. at DD001365. The next paragraph stated that by February, 1986, Mr. White was going to assign 50 TVA employees to investigate safety-related concerns. On the day of Mr. White's arrival, Richard Feil, QTC's Project Manager, heard a rumor that QTC going to be cut out of TVA's Employee Concern Program, the contract for which had been signed the previous week.

Upon arrival at TVA, Mr. Brodsky undertook a review the employee concerns in order to formulate a program for their resolution, which he would present to Mr. White. By the end of the first week on the job, Mr. Brodksy, after consultation with TVA managers, outlined a program which emphasized the grouping of issues into categories; and the use of experts of sufficient reputation to give credibility to the resolution of the problems. Mr. Brodsky, a member of the National Academy of Science with extensive experience in the nuclear power industry, considered

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engineering concerns to be the most important to review, and to require the use of outside contractors. He believed it was important to select engineering firms, e.g., Bechtel or Sargent & Lundy, with a national reputation for nuclear experience. With regard to the investigation of intimidation and harassment allegations, Mr. Brodsky's original intention was to assign them to the Office of the Inspector General.

On January 17, 1986, Mr. White requested the attendance of William Mason in his office in Chattanooga to discuss the QTC contract. Because of the urgency of the request, TVA chartered an airplane to fly Mr. Mason from Knoxville to Chattanooga. Mr. Mason had a series of meetings with Mr. White and other TVA managers during that day. The quality of QTC work and the protection the ERT records were subjects of discussion. Mr. Mason told Mr. White that, based on the work done for the Office of the General Counsel (OGC), OGC did not have the complaints about QTC that others voiced, and in fact OGC wanted QTC to continue to work for OGC as long as OGC was responsible for reporting on investigations of employee allegations of intimidation and harassment. CX-551, at 11. Mr. Mason added that DGC worked at communicating with QTC, while the other TVA managers apparently did not talk to QTC, and that this lack of communication could be a contributing factor to their views that QTC's work was not satisfactory. *Ibid*.

Mr. White told Mr. Mason that QTC was threatening to remove ERT records at the end of January upon the expiration of the contract funding. He asked Mr. Mason to draft a letter advising QTC not to remove the records from Watts Bar and limiting its participation in the investigation of safety-related concerns. CX-551, at 12; CX-262, at

1037-40; Mason, Tr. 926-27; Cunningham, Tr. 119. Mr. Mason prepared a draft letter and it with Mr. White. The draft was reviewed and revised by Messrs. White, C. Mason, Wegner, Brodsky, Cottle, and Denise. Mason Depo., at 63-64. on January 22, 1986, the letter was made final, for the signature of Charles Mason, and delivered late in the evening to a secretary of QTC. RX-40; Thero, Tr. 217.

13. On January 22, 1986, QTC had from 60 to 80 employees at Watts Bar. The letter notified Mr. Schum that during the closeout of the Watts Bar program which was expected in mid-1986, QTC would be required to maintain control of the

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confidentiality of the Watts Bar operations, for which purpose QTC's level of effort after February 1, 1986 would require five employees. QTC's support for OGC's investigation of intimidation and harassment would be phased out by May 1, 1986, when TVA's OIG was expected to assume responsibility for that area. To Support this QTC participation, the letter proposed to amend the TVA-QTC contract by adding $750,000 to the contract amount, and extending the completion date to July 25, 1986. RX-40. The letter in effect excluded QTC from the investigation and closure of safety-related concerns, reduced its role to that of maintaining confidential records with five employees, and left indeterminate the amount of support that would be requested by OGC. on January 23rd, Mr. Schum rejected the TVA's proposal. RX-42. On the same date, he notified all QTC personnel that apparently QTC's services would be terminated as of close of business, January 31, 1986. RX-43. On the next day, Mr. Denise confirmed in writing to Mr. Schum previous telephone conversations, to the effect that TVA did not expect to request additional services from QTC under Contract No. TV-68705A after January 31, 1986. RX-45. This is the second contract which had been signed on January 10, 1986.

On January 24, 1986, Messrs. Schum, Thero, Hill, and QTC's attorney met with Messrs. Chuck Mason, William Mason, Denise and Siskin to discuss TVA's letter of January 22, 1986. At the meeting, it was agreed that QTC would finish safety concerns investigations that were 80 percent completed; and would develop a procedure to expurgate employee concern files, i.e., to remove names and other identifying information so that TVA could use the files without breaching the promise of confidentiality made to the concerned employees. For these purposes, a fourth amendment to the original contract was signed, raising the contract amount by $750,000.

14. The reduction of QTC's services became instantly a public issue. The local press reported numerous explanations by various TVA and QTC officials, as well as expressions of concern by members of Congress and NRC. One of Complainants characterized the media event as a war by press releases. Daley, Tr. 1038.

The relationship between TVA and QTC deteriorated rapidly. Contract negotiations came to an impasse. As a result, QTC left the Watts Bar plant site on April 18, 1986. Thero,

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Tr. 265.

Timeliness

I

Section 5851(b)(1) of the ERA provides that any employee who believes that he has been discharged or discriminated against in violation of the Act may file a complaint with the Secretary of Labor "within 30 days after such violation occurs". *See also* 29 C.F.R. § 24 3(b). The complaint in this case was filed on October 16, 1986, and amended the following day. It alleges that TVA violated the ERA when it drastically narrowed the TVA-QTC contract in January 1986, and again in March 1986, when it refused to renegotiate the contract with QTC. Anticipating a defense of timeliness, the complaint alleges that TVA actively misled both QTC and public authorities concerning the true reason for its actions, and argues that the 30-day limitations period was tolled until September 22, 1986, when Complainants learned of the true reason.

In her Decision and Order of Remand, the Secretary of Labor declined to rule on the timeliness issue. The Secretary held that, on remand, Complainants would have the burden of proving that the facts justify application of the doctrine of equitable tolling, citing *School District of the City of Allentown v. Marshall*, 657 F.2d 16, 19-20 (3d Cir. 1981). In this case, which arose under a kindred statute, the United States Court of Appeals for the Third Circuit held that equitable tolling may be appropriate principally in three categories of cases, one of which is where the defendant has actively misled the plaintiff respecting the cause of action. 657 F.2d at 19-20. Complainants contend that their case falls within this category.

In 1983, the same court observed that the case law pertaining to equitable tolling had "proliferated rapidly" in the previous few years, with the result that each side could cite numerous cases to support its position. *Meyer v. Riegel Prod. Corp*., 720 F.2d 303, 307 (3d Cir. 1983). In fact, there may be found in cases a variety of formulations, with numerous qualifications and refinements. *See generally*, *Hobson v. Wilson*, 737 F.2d 1; 32-36 (D.C. Cir. 1984); *Pinney Dock and Transport Co. v. Penn. Cent. Corp*., 838 F.2d 1445, 1465-1472 (6th Cir. 1988). There is not any one formulation of the equitable tolling doctrine that could account for its application to all the

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numerous fact situations. Since the present case arises in the Sixth Circuit, I look to the decisions of that circuit for guidance, which are controlling anyway.

TVA cites *Dayco Corp. v. Goodyear Tire & Rubber Co*., 523 F.2d 389 (6th Cir. 1975), a private antitrust action, where the court recognized that the statute of limitations may be tolled if a plaintiff has not filed its action in time because of ignorance resulting from a defendant's fraudulent concealment. The court held that in order to make out a case of fraudulent concealment, a party must plead and prove (1) wrongful concealment of his actions by the defendant; (2) failure of the plaintiff to discover the operative facts that are the basis of his cause of action within the limitations period; and (3) plaintiff's due diligence until discovery of the fact. 523 F.2d at 394. With regard to the third element, the court emphasized that a party has a positive duty to use diligence in discovering his cause of action within the limitations period, and that any fact that should excite his suspicion is the same as actual knowledge of his entire claim. *Ibid*. The Sixth Circuit adhered to this doctrine in *Campbell v. Upjohn Co*., 676 F.2d 1122, 1126-27 (6th Cir. 1982), *Pinney Dock and Transport Co. v. Penn Cen. Corp*., 838 F.2d 1445, 1165 (6th Cir. 1988), and *Friedman v. Estate of Presser*, 929 F.2d 11511 1159 (6th Cir. 1991).

There is another line of cases in the Sixth Circuit, that apply the doctrine of equitable tolling specifically to employment discrimination complaints. Generally, the doctrine has been applied in situations where the employer has made affirmative representations to the employee, causing him to delay filing a claim, and in situations where a plaintiff has pursued an alternative remedy in a wrong forum. *Wilson v. Grumman Ohio Corp*., 815 F.2d 26, 28 (6th Cir. 1987); *Brown v. Mead Corp*., 646 F.2d 1163, 1165 (6th Cir. 1981). The court has cautioned that the concept of equitable tolling is not an escape valve. Ibid. On the other hand, the court has demonstrated sensitivity to the remedial purposes of Title VII of the Civil Rights Act of 1964. *Andrew v. Orr*, 851 F.2d 146, 151,(6th Cir. 1988). Thus, the equitable tolling doctrine followed by the Sixth Circuit appears to be in agreement with the Supreme Court's pronouncement in *Irwin v. Veterans Adm*., - U.S.-, 111 S. Ct. 453, 457-58 (1990):

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> But an examination of the cases in which we have applied the equitable tolling doctrine as between private litigants affords petitioner little help. Federal courts have typically extended equitable relief only sparingly. We have allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass. We have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights. (citations and footnotes omitted).

III

By letter of January 22, 1986, Charles C. Mason, Deputy General Manager of Nuclear Power, notified W. Scott Schum, a principal officer of QTC, of the reduction of QTC activities as of February 1, 1986. RX-40. By letter of January 23, 1986, Mr. Schum notified QTC employees of the TVA letter and the apparent termination of QTC services as of close of business, January 31, 1986. RX-43. By letter of March 28, 1986, Richard P.

Denise, Program Manager for Watts Bar Employee Concern Task Group, notified Owen L. Thero, ERT Program Manager for QTC, that negotiations with regard to Supplement No. 5 to TVA Contract No. TV-66317A were terminated. RX-73. Mr. Thero had already given QTC employees a two-week notice of termination of services, effective March 31, 1986. RX-67. Thus, by April 1, 1986, Complainants were aware of both contract actions complained of herein. The thirty day filing period started to run on that date. *See Merrill v. Southern Methodist Univ*., 806 F.2d 600, 605 (5th Cir. 1986); *Billings v. Tennessee Valley Authority*, Case No. 86-ERA-38, Secretary's Final Decision and order of Dismissal, June 28, 1990, *aff'd without published opinion*, 923 F.2d 854 (6th Cir. 1991). Complainants missed the statutory deadline by more than five months. And the question, framed by Complainants themselves, is whether TVA is estopped from setting up the limitations period.

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IV

The scope of the original TVA-QTC contract was restricted by TVA acting unilaterally, without consultation with any QTC manager. Apart from Mr. Siskin's statement at the January 24, 1986 meeting, that Mr. White wanted total control of the employee concern program and was going to do the work himself, TVA never told QTC directly the reasons for the termination of two contracts. However, TVA's officers and agents made numerous statements to the press, NRC, and members of Congress, concerning TVA's reasons for the contract terminations. TVA's spokesman was quoted as saying that, with all the engineering talent that TVA had, there was no need to hire QTC to locate specialized engineering talent and bring it to TVA; that hiring specialized engineers from around the country to investigate safety questions at TVA's nuclear plants would be just an extra expense for ratepayers. Mr. White was quoted as telling reporters on January 30, 1986, that his decision to end QTC contract had not been a quick one, but was part of a plan that was in place before he took over the Office of Nuclear Power. TVA Director John B. Waters was quoted as feeling that QTC's $11 million dollar proposal was a tremendous amount of money for the job QTC was going to do, and that Mr. White would do that job as well or better, with resulting savings to ratepayers. These, and more, explanations are found in newspapers and trade journal articles attached to the *Stipulation* of November 1, 1990. The parties have stipulated that these articles were circulated and generally read. Also, Messrs. White and Dean stated to Congressman Cooper and Senators Sasser and Gore that QTC was lazy, slow, and wrote the worst investigation reports ever written. Thero, Tr. 240-41; Schum Depo., at 186-87.

V

Complainants assert that they did not file a complaint within 30 days of receiving the January 22, 1986 letter because TVA provided legitimate, nondiscriminatory business reasons for its decisions, and there was no evidence that TVA had discriminated against them. Complainants additionally assert that they did not file a complaint at the time their employment ended because TVA had misled them, through its public pronouncements, to

believe that TVA fired QTC for other than discriminatory reasons. Complainants' Post-Hearing Findings of Fact and Conclusions of Law, at 183-184.

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Complainants have not brought their case within the equitable tolling doctrine of fraudulent concealment. This doctrine applies to cases where the defendant has fraudulently concealed his *actions*, so as to prevent the plaintiff from discovering his cause of action. The fraudulent concealment doctrine relates to concealment of conduct, not intent. *Dayco Corp. v. Firestone Tire & Rubber Co*., 386 F. Supp. 546, 549 (N.D. Ohio 1974), *aff'd sub nom*. *Dayco Corp. v. Goodyear Tire & Rubber Co*., 523 ;.2d 389 (6th Cir. 1975). It is at least questionable whether public statements of motives on which Complainants rely, amount to concealment at all. *See Campbell v. Upjohn*, 676 F.2d 1122, 1127-28 (6th Cir. 1982).

But there is no question in my mind that Complainants have not satisfied the requirement of due diligence. Addressing this element of the *Dayco* standard, Complainants argue that "[b]ecause TVA actively concealed the facts giving rise to this cause of action it is obvious that the facts that support complainants' cause of action would not have been apparent to a reasonable person exercising due diligence, prior to September 22, 1986, the date the *Knoxville Journal* published Mr. Wegner's "cancer statement"[sic]. Complainants' Post-Hearing Findings of Fact and Conclusions of Law, at 246. I cannot agree. By April 1, 1986, Complainants had notice of the harm to their employment relation with QTC and the causation of the harm by TVA. These two facts triggered the limitations period and the duty to make inquiries to discover whether they had a good cause of action. *See United States v. Kubrick*, 444 U.S. 111, 100 S. Ct. 352 (1979). It is knowledge of the injury and its cause that leads a diligent person to inquire whether the injury is wrongful and actionable. In *Donovan v. Hahner, Foreman & Harness, Inc*., 736 F.2d 1421, 1427 (10th Cir. 1984), on which Complainants rely, the trial court found that the defendant had deliberately concealed the fact that a worker had actually been discharged, as opposed to being laid off. In other words, the very fact of injury had been concealed.

Moreover, the same newspaper and trade journal articles (attachments to the November 1, 1990 *Stipulation*) on which Complainants rely to prove that they were misled by TVA, should have excited their suspicion and moved them to make inquiries. *The Energy Daily*, January 28, 1986, reported that Watts Bar employees had contacted their representatives in Washington, D.C., charging that TVA did not want a contractor around which

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told the agency news it did not want to hear. The same article also quoted Congressman Cooper as stating that QTC had more credibility with Congress than the entire TVA

board, and that he hated the thought that QTC might be dismissed for doing too good a job. The *Chattanooga Times*, January 24, 1986, quoted Congressman Cooper as saying that TVA's decision to no longer use QTC to investigate employee safety concerns was a serious mistake and that to some employees it might begin to look like an attempt to cover up problems in the agency. The Chattanooga Times, Feb. 6, 1986, quoted Congressman Dingell as stating that the two organizations that were created to identify and resolve employee concerns (NSRS and QTC) were being suppressed. The press also reported expressions of concerns from Senators Sasser and Gore, as well as James K. Asseltine, a member of NRC. However, after meeting with Mr. White and TVA Board Chairman Charles Dean in Washington, D.C. on January 28, 1986, both senators were also reported as expressing support for Mr. White's decision.

In sum, despite obvious suggestions of improper motivation, Complainants made no effort to investigate their claim within the thirty day filing period, nor for the following five months. I cannot find that this inaction is consistent with the requisite diligence.

VI

Nor have Complainants made a convincing case that they were misled by TVA to delay the filing of their complaint.

Of the twenty-three Complainants, only Hill, Daley, Hough, Bird, Kulp, and Swain testified at the hearing. By Stipulation of November 1, 1990, the parties have agreed that the other complainants would, if called, testify that the reasons they did not file a complaint under the ERA until October 16 and 17, 1986 were the same as those of the testifying Complainants.

Mr. Hill testified that he was familiar with pertinent cases and interpretations under Section 210 of the ERA; that it was his understanding that a complaint had to be filed within thirty days from the time one became aware of the discrimination that he did not file a complaint after looking at TVA's January 22, 1986 letter because there was no apparent evidence of discrimination, his initial impression being that there was a misunderstanding; that he did not file a complaint after leaving

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TVA in April, 1986 because he did not see any actual indication of discrimination; that the reasons given out by TVA did not fit a Section 210 case; and that he first came to believe that he had been discriminated against when he read a statement in the *Knoxville Journal*, in September 1986, that QTC was a cancer to be dealt with. Hill, Tr. 597-601. On cross-examination, Mr. Hill stated that in January 1986 he felt that the reasons given by for terminating the contract were either untrue or inaccurate. Hill, Tr. 718.

Mr. Daley testified that in January/February, 1986 he was award that TVA had reduced the scope of the QTC work; that he did not file a complaint at that time because TVA

management was giving out a number of reasons for the reduction, and that, as a professional quality assurance engineer, he was "accustomed to people disagreeing or not being totally receptive to having problems identified to them"; that he had no reason to believe that the reasons stated to QTC and the press were not accurate and truthful; and that after leaving QTC at the end of March, 1986, he still had no reasons to believe that the reasons for releasing QTC were other than those represented by TVA. Daley, Tr. 1054-55. On cross-examination, Mr. Daley testified that he knew in early 1986, from newspapers, that TVA officials were accusing QTC for being lazy and expensive, and not doing a quality job; that he did not agree with those views, but he realized that Mr. White and his new management team did not know enough about QTC to make an accurate assessment of its work. Daley, Tr. 1064-65.

Mr. Hough testified that he did not file a complaint when he was notified of the TVA's January 22, 1986 letter because the whole idea of being discriminated against did not even occur; that the explanations in terms of laziness, costs, etc, did not fit the Section 210 standard; that in view of the change of management at TVA it was necessary to wait and see how the whole program was going to be handled; and that even after the termination of the contract, the decision appeared to be a business one. Hough, Tr. 1118-19. On cross-examination, with reference to TVA's criticisms of QTC reported by the press, Mr. Hough stated that he was doing a professional job and that TVA's views about his work were wrong. Hough, Tr. 1140.

Mr. Bird testified that he did not agree at all with

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Mr. White's criticisms of QTC work, as reported in newspapers; that he did not file a complaint because there was no reason to suspect discrimination; that since TVA had substantially changed its nuclear organization by bringing in Mr. White, it was quite probable that Mr. White did not feel the need for QTC's services; that he was familiar with the elements of a Section 210 case when he left the TVA site in April 1986; and that he did not remember whether he considered filing a complaint when he learned of the reduction of the QTC work. Bird, Tr. 1183-85.

Mr. Kulp testified that he did not see the closeout of the ERT program as being/in retaliation for his safety investigations; that he thought it was part of an attempt by TVA to gain greater control over the program; and that, when he read the "cancer" statement in September 1986, he realized that he had been misled by TVA's criticism of his work quality. Kulp, Tr, 1722, 1729-30.

Finally, Ms. Swain testified that she read the newspaper reports of TVA's reasons for terminating QTC in January 1986; that the reasons were that QTC workers were slow, lazy, and did poor quality work; and that she did not file a complaint at that time because she was not aware of any grounds for a discrimination suit. Negotiations were going on to which she was not privy. She was confused and after leaving TVA on April 17, 1986, she

did not file a complaint because, while the reasons that given were not true, she could not do anything about it. Swain, Tr. 1333-34, 1353.

I note that Complainants do not contend that TVA's agents made false statements directly to them. Their argument is that TVA "engaged in an aggressive media campaign to convince complainants, the NRc, Congress and the public at large, that it fired QTC because it was lazy, slow, wrote poor quality reports, and was too expensive". Complainants' Post-Hearing Findings Fact and Conclusions of Law, at 245. Complainants further allege that TVA knew its statements to Congress and the press were false, and that TVA "made them in order to conceal from the complainants the actual discriminatory reasons for the termination of their employment". Id. Complainants also assert that their reliance on TVA's stated reasons for their termination was reasonable.

Glus v. Brooklyn Eastern District Terminal, 359 U.S. 231;

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79 S. Ct. 760 (1959), involved an action for damages due to an industrial disease. The applicable limitations period was three years. The complaint alleged that defendant's agents and employees had "fraudulently or unintentionally, misstated to plaintiff that he had seven years in which to bring an action Id. at 232 n. 2, 79 S. Ct. at 761 n. 2. Reversing a dismissal of the suit for untimeliness, the Court held that, despite the delay in filing suit, plaintiff was entitled to have his cause tied on the merits if he could prove that defendant's agents had conducted themselves in such a way that plaintiff was justifiably misled into a good-faith belief that he could begin his action within seven years. The rationale for the decision was that a man may not take advantage of his own wrong, so that when a party to a transaction has by his representations or conduct induced the other party to give him an advantage which it would be against equity and good conscience for him to assert, he will not be permitted to avail himself of that advantage. 359 U.S. at 233 79 S. Ct. at 762. The facts in *Glus*, and the cases discussed therein to illustrate the applications of the equitable maxim, make clear that the representations or conduct must be directed to the party who claims the benefit of equitable estoppel. *See Leake v. University of Cincinnati*, 605 F.2d 255, 259 (6th Cir. 1979) (University's counsel requested additional time to investigate the discrimination complaint; in return for the assurance that investigation time would not be used to prejudice complainant with regard to the statute of limitations).

Knaysi v. A.H. Robins Co., 679 F.2d 1366 (11th Cir.), *reh'gs denied*, 688 F.2d 852 (11th Cir. 1982), cited by Complainants, is consistent with this principle. *Knaysi* involved a suit for damages resulting from injuries allegedly caused by the use of a medical device manufactured and distributed by the defendant. The complaint alleged that the defendant had published information about the device which it knew to be false and had suppressed damaging information about the device's danger. Applying New York law of equitable estoppel, the Court of Appeals for the Eleventh Circuit held that there were issues of material facts regarding alleged representations made by the defendant and the plaintiff's

due diligence in bringing suit, which precluded summary judgment on the basis of the statute of limitations. The court stated that the medical community and the consuming public, either directly or in justifiable reliance upon medical advice, rely on drug manufacturers for accurate information and assurances regarding the safety and efficacy of their

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products. 679 F.2d at 1369. The dissenting opinion indicates that the alleged misrepresentation concerning the device was contained in brochures which defendant gave to physicians for ultimate distribution to patients. In other words, the misrepresentation was intended for, and directed to, the user of the product.

Complainants do argue that TVA engaged in an aggressive media campaign to convince Complainants, among others, of its reasons for firing their employer; that TVA's statements to the press and Congress were false and made in order to conceal its discriminatory motivation from Complainants. But this argument has no support in the record. The aim of TVA's media campaign and representations to Congressmen and NRC was to secure public and official support for its decisions. It is not evident from the record that TVA's responsible agents (Board members, Mr. White, agency spokesperson) were concerned with Complainants. It is unlikely that Messrs. Dean and White came to Washington, D.C. and spoke to Congressman Cooper and Senators Sasser and Gore, in order to mislead Complainants about the causes of action, which are grounded in part on the cessation of contract negotiations which occurred two months after the TVA's visit to the Congressmen. I note that the allegations of the complaint in *Knaysi* set out a case of simple fraud, an intentional permission of truth in order to induce another, in reliance upon it, to part with some goods or surrender some rights. I do not believe that TVA was trying to obtain anything from Complainants.

In addition, in order to prove that TVA's statements misled them into a state of inaction for six months, Complainants must prove they reasonably relied on the statements. Detrimental reliance is an essential element of equitable estoppel. *Jensen v. Frank*, 912 F.2d 517, 521 (1st Cir. 1990). I have my doubts as to whether TVA's statements reported in the press had anything to do with Complainants' delay in filing their complaint. Mr. Hill knew in January 1986 that the reasons given by TVA for terminating the contract were either untrue or inaccurate. The other testifying Complainants gave sundry reasons for not filing their complaint before October 1986. But, putting aside these doubts, I find that under all the circumstances existing in the first quarter of 1986, any reliance by Complainants on TVA's conflicting statements of reasons was not justified. To what I have already stated in considering the issue of due diligence, I may add that Complainants had special reasons to suspect the

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explanations published by TVA. They knew that TVA management did not have much credibility, and in particular that it was believed. to be prone to retaliate against employees who expressed safety concerns. This is why QTC was contracted to investigate employee concerns, and Complainants, activities under the contract disclosed that TVA employees feared retaliation.

In my view, the probable cause of Complainants' delay in filing their Complaint is to be found in their indirect relationship to TVA. Complainants were employees of QTC, which had a contract with TVA. Complainants were not parties to that contract. When TVA narrowed the scope of the contract and later failed to renew it, Complainants apparently viewed the termination of their employment as an indirect result of an extraneous dispute between QTC and TVA. The indirect causation of the injury explains why Complainants remained passive for six months, while QTC involved its lawyer in the dispute two days after receiving the January 22, 1986 letter from TVA, as Mr. Hill knew.

VII

By reason of the foregoing, it is my conclusion that Complainants have failed to prove that the facts of their case justify application of the doctrine of equitable tolling. Accordingly, my recommendation to the Secretary of Labor will be to dismiss the complaint herein on the ground that it is time barred. However, in order to help the case along to a conclusion, I will address other issues which are common to all Complainants.

Res Judicata

In 1987, Quality Technology Company brought an action against Stone & Webster Engineering Company, Inc., Stemar Corporation, Beta, Inc., and Steven A. White. The complaint alleged four causes of action, including (1) inducement of TVA to breach its contract No. TV-66317A with QTC (the same contract involved in the case before me); and (2) tortuous interference with QTC's business relationship with TVA. The United States District Court for the Eastern District of Tennessee dismissed the action on defendants' motion for summary judgment. *Quality Technology Co. v. Stone & Webster Engineering Co*., 745 F. Supp. 1331 (E.D. Tenn. 1989), aff'd, 909 F.2d 1484 (6th Cir. 1990), *cert. denied*, No. 90-1184 (U.S. May 20, 1991).

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TVA asserts that the previous QTC litigation has res judicata effects on Complainants, case. TVA contends that Complainants may not relitigate any matter relating to the nature or ending of the QTC's contracts that was or could have been raised in the previous lawsuit; that they cannot claim that the TVA-QTC contracts were "wrongfully" terminated or interfered with; and even that they, as former employees of QTC, may not now assert before the Department of Labor a claim of retaliation that could have been raised in the previous court proceedings. Respondent's Post-trial Brief, at 60-67.

There are no *res judicata* problems in the way of Complainants. The flaw in the various arguments of TVA lies in the major premise that Complainants claim through QTC and are in privity with QTC. This is not a case of mutual or successive relationship to the same rights, which is the essence of privity. Complainants are asserting rights which they derive from the ERA, not from the TVA-QTC contract. As a matter of contract law, TVA may have had the privilege of not requesting additional services from QTC for any reason. But the statute overrides the contract, and imposes on TVA the duty not to discriminate against employees for a reason that the statute declares impermissible. Moreover, Complainants, rights, if any, run against TVA, not the defendants in the previous Federal case. In sum, QTC had no standing to assert in its lawsuit rights that belong to Complainants and run against TVA which was not a party to the lawsuit.

Burdens of Proof

I

Section 210 of the Energy Reorganization Act of 1974, 42 U.S.C. § 5851, provides as follows:

> § 5851. Employee protection
> (a) Discrimination against employee
> No employer, including a Commission licensee, an applicant for a Commission license, or a contractor or a subcontractor of a Commission licensee or applicant, may discharge any employee

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> or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)--
> (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended [42 U.S.C.A. S 2011 et seq.], or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;
> (2) testified or is about to testify in any such proceeding or;
> (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended [42 U.S.C.A. § 2011 *et seq*.].

In this case, it is conceded that TVA is subject to the Act. Complainants rely on the third clause of Section 5851(a).

In *Dartey v. Zack Co*., Case No. 82-ERA-2, Secretary's Decision and Final Order issued April 25, 1983, the Secretary of Labor sets forth the basic allocation of burdens and order of presentation of proof to be applied in cases arising under the ERA and related statutes.

See 29 C.F.R. Part 24. The complaining employee initially must present a *prima facie* case consisting of a showing that he engaged in protected conduct, that the employer was aware of that conduct and took some adverse action against him, and that the evidence is sufficient to raise the inference that the protected activity was the likely reason for the adverse action. If the employee establishes a *prima facie* case, the employer has the burden of going forward with evidence of legitimate, nondiscriminatory reasons for his action.

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If the employer rebuts the *prima facie* case, the employee still has the opportunity to demonstrate that the proffered reasons were not the true reasons, but a pretext for discrimination. These rules concerning the production and evaluation of the evidence were derived from *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089 (1981), and *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 97 S. Ct. 568 (1977). Significantly, the employer bears only a burden of production; the ultimate burden of persuasion, by a preponderance of the evidence, remains at all times with the complaining employee.

II

At the outset, TVA contends that Complainants must carry a heavier burden of proof than mere preponderance of the evidence. It argues that, as a governmental agency, TVA enjoys a "strong presumption" that its contract decisions were correct and taken in good faith, and that "well-nigh irrefragable proof" is required to overcome the presumption. Respondent's Post-trial Brief, at 70-71. The case law recognizes a strong presumption of regularity for official actions. *See Kalver Corp. v. United States*, 543 F.2d 1298, 1301-02 (Ct. Cl. 1976) (termination of contract allegedly in bad faith); *Sanders v. United States Postal Service*, 801 F.2d 1328, 1331 (Fed. Cir. 1986) (termination of employment); *Starr v. Federal Aviation Administration*, 589 F.2d 307, 315 (7th Cir. 1978) (rejection of pilot's application for exemption from Age 60 Rule).

On the other hand, three circuits have construed the ERA broadly in order to effectuate its remedial purpose of protecting workers from retaliation based on disclosure of safety concerns. *DeFord v. Secretary of Labor*, 700 F.2d 281, 286 (6th Cir. 1983); *Mackowiak v. University Nuclear Systems, Inc*., 735 F.2d 1159, 1163 (9th Cir. 1984); *Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505, 1512 (10th Cir. 1985). The purpose of the employee protection provisions of the ERA is to encourage employees in the nuclear power industry to cooperate with NRC in the prevention of accidents which could be catastrophic. To shield a covered employer from enforcement of the statute with a nearly irrebuttable presumption of regularity and good faith, which TVA claims' would frustrate the statutory purpose by rendering the

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employee protection illusory. For this reason, I believe that, in regard to the ERA, TVA stands on the same level with private employers, and can demand no more than a preponderance of the evidence. *Cf. DeFord v. Secretary of Labor*, *supra*, at 2877 *see Pogue v. Unite Stated Dep't. of the Navy, Mare Island Naval Shipyard*, Case No. 87-ERA-21, Secretary's Final Decision and Order, May 10, 1990, at 60.

Protected Activities

I

There is a split of authority on the question whether the ERA protects an employee who discloses safety concerns to the employer, rather than a government agency. The Ninth and Tenth Circuits have held that the filing of internal safety reports or complaints with an employer is protected activity. *Mackowiak v. University Nuclear Systems, Inc*., 735 F.2d 1159, 1163 (9th Cir. 1984); *Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505, 1513 (10th Cir. 1985); *see also Consolidated Edison Company of New York*, *Inc. v. Donovan*, 673 F.2d 61 (2d Cir. 1982); *contra, Brown & Root, Inc. v. Donovan*, 747 F.2d 1029 (5th Cir. 1984). The Secretary of Labor's interpretation of the scope of protected activity coincides with the majority rule.

In regard to the issue of whether Complainants were engaged in protected activities, TVA makes two arguments. It argues that Complainants did not raise internal safety concerns, but only took down concerns raised by others. In addition, TVA argues that some of Complainants did even less, performing only secretarial duties. This activity, TVA concludes, cannot constitute participation in an NRC proceeding. Respondent's Post-trial Brief, at 72-73.

Section 210(a)(3) of the ERA includes more activities than TVA's arguments presuppose. The clause includes participation or assistance in agency proceeding, as well as "any other action to carry out the purposes" of the ERA or the Atomic Energy Act of 1954. It is true, as a general proposition, that those among Complainants who worked in the capacity of interviewer or investigator collected and investigated safety concerns expressed by others. But, in my view, these activities are as much within the protection of the ERA as the discovery of the problems, because the discovery, disclosure, and investigation of potential

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hazards are all essential steps in the prevention of accidents. This is the reason why QTC was hired in the first place. So long as TVA employees were unwilling to report defects they had discovered, neither TVA nor NRC could determine the safety status of TVA's nuclear power plant.

I also reject the second argument, concerning Complainants Patricia Turner, Dorothy Dixon, Teresa Swain, and Kay Stephens who worked in a support capacity. The TVA-

QTC contract envisioned a group effort. Performance of the contract entailed an organization of personnel and functions for united action. Administrative and clerical tasks were essential to achieving the objective of the contract. Moreover, Ms. Swain, by her testimony, and similarly situated employees, by stipulation of the parties, were involved in handling and controlling confidential information. They received files from the interviewers, put information into computers in such a way that QTC could keep track of the concerns and of the employees who had expressed them, and generated reports. Swain, Tr. 1312-15.

In sum, the model of a,quality assurance inspector who by himself discovers a defect, writes up a report, and delivers it to a superior is not an appropriate standard in determining whether Complainants engaged in protected activities. Under the circumstances of this case, I believe that all Complainants participated in actions to carry out the purposes of the ERA.

II

I must add that QTC employees, including Complainants, were in a real sense the "eyes and ears of the NRC" at Watts Bar. *Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505, 1507 (10th Cir. 1985). NRC was familiar with the work that QTC was doing for TVA and relied on its findings in carrying out its own responsibilities under the ERA. QTC was doing work that otherwise would have had to be done by NRC. See Ward, Tr. 1274 Thus, NRC personnel conducted periodic inspections of the ERT program, which consisted of selective examinations of procedures and representative records, interviews with QTC personnel, review of their qualifications, and observation of their activities. *See generally*, CX-213 (NRC Inspection Report). Part of QTC's responsibility was to identify deficiencies that TVA was required to report to NRC pursuant to regulations at 10 C.F.R. § 50.55 (e). Id. at 700726.

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Toward the end of January 1986, QTC notified NRC that there was only an oral agreement between QTC and TVA to preserve the integrity of the original unexpurgated records resulting from the employee concern program. Thereupon NRC, already aware of the contract dispute between QTC and TVA, issued an Order Modifying Licenses, ordering TVA to prohibit the destruction or removal of QTC records and to direct QTC to permit inspection and copying of the records by NRC representatives. RX-49. The stated basis of the order was that NRC's health and safety responsibilities might require NRC representatives to review the QTC records in order for NRC to have reasonable assurance that the safety concerns affecting TVA's licensed facilities had been identified, properly evaluated, and resolved. In the first part of April 1986, NRC representatives did copy QTC original records, with the assistance of QTC secretarial staff.

In sum, QTC employees, including Complainants, assisted and participated in NRC proceedings "for the administration or enforcement of any requirement imposed" under the ERA. 42 U.S.C. § 5851 (a)(3).

Discriminatory Intent

I

In order to establish a case of discrimination under the ERA, Complainants do not have to prove that their protected activities were the sole, or even the major, reason for the TVA's actions that resulted in their loss of employment. It is sufficient to prove that those actions were motivated at least in part by their protected activities. *See DeFord v. Secretary of Labor*, 700 F.2d 281, 287 (6th Cir. 1983); *Mackowiak v. University Nuclear Systems, Inc*., 735 F.2d 1159, 1162-63 (9th Cir. 1984). I am of the view that the preponderance of the evidence requires the conclusion that TVA restricted the scope of the TVA-QTC contract and refused to renegotiate it in part because of QTC's protected activities.

II

1. Complainants have presented circumstantial and direct evidence of an intent to retaliate. I begin by observing that

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the hiring of an outside organization to speak to TVA's employees was not entirely of TVA's own choosing. Although TVA was not formally ordered by NRC to engage an independent contractor to identify the employees' concerns, it was hardly in a position to ignore NRC's suggestion to do so, under the circumstances prevailing in its nuclear program in May 1985. As I have pointed out above, QTC was hired because TVA's employees did not trust TVA's managers, and in fact feared reprisal from the managers if they disclosed safety concerns. Thus, the presence of QTC at Watts Bar was not a compliment to TVA's line managers.

2. By the terms of the contract, QTC reported to NSRS, a staff of engineers who conducted safety reviews and audits of TVA's nuclear power plants, and reported their findings directly to TVA's Board of Directors and General Manager. Because of their function as judges of management's operations with respect to safety, the engineers of NSRS would naturally become involved in disputes with managers, and become an irritant to them. By reporting safety concerns to NSRS, QTC came to be associated with NSRS and to incur the resentment of line managers.

The existence of irritation and disagreement between TVA management and QTC is reflected in a report of a meeting William Mason had with QTC on October 31, 1985. According to this report to the General Counsel, Mr. Thero stated at the meeting that he

had staked the company (QTC) on TVA being able to obtain an NRC license; that those "loyal TVA employees, who refused to recognize and help solve problems uncovered by QTC were in fact not helpful to TVA; and that TVA had to stop attacking QTC and defending bad work, and start applying some creative problem-solving. CX-144, at 002704. It appears that management viewed the multitude of safety concerns collected by QTC as adverse criticism of their work. I add briefly that the record contains evidence of specific confrontations, e.g., at the congressional caucus meeting in September 1985, and between the site director and Complainant Hill over the comparison of Watts Bar with Zimmer.

3. In October, 1985 Messrs. Siskin, Wegner, White, and others met with senior TVA managers, including Hugh Parris, Chuck Mason, and William Cottle. The managers expressed dissatisfaction with the ERT program administered by QTC. Mr. Parris, Manager of the Office of Nuclear Power, complained that QTC was finding too many problems, that it was a cancer. Mr. Siskin

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understood the characterization to mean that QTC would prove fatal to TVA's nuclear program unless it was cut out. Siskin, Tr. 3926-28.

During the inspection tour that ensued, Mr. Wegner found a pervasive feeling of hostility against QTC and NSRS. The inspection team heard three kinds of complaints from TVA managers. The managers were unhappy because NSRS and QTC were independent of line management that had the responsibility to fix the problems raised by NSRS and QTC. Messrs. C. Mason and Cottle also complained that there was a direct link from QTC to Washington, D.C. and NRC, that QTC employees were communicating directly with members of Congress and NRC without obtaining TVA's permission. Mr. White also recalls discussing NSRS and QTC, which were a bore point with TVA managers. White, Tr. 2179. In sum, by the time Mr. Wegner drafted the Memorandum of Understanding in December 1985, he and Mr. White understood that TVA managers expected Messrs. White and Wegner to do something about NSRS and QTC, to fix the problem. Wegner, Tr. 3447-48. Mr. Wegner was Mr. White's closest advisor.

4. Steven White's contract with TVA was signed in the early morning of January 3, 1986 at TVA's hangar in the Knoxville airport. Mr. Wegner had a conversation with Mr. W. Mason concerning QTC. There is no dispute as to a conversation or its subject matter. otherwise, the participants offer conflicting versions.

Mr. Mason testified that as he was leaving the hangar, he was approached by Mr. Wegner who asked him if he could terminate contracts as well as negotiate them. Mr. Mason responded affirmatively, and asked Mr. Wegner what he had in mind. Mr. Wegner named "Qual Tech" explaining that they had a problem with Qual Tech and needed to terminate the contract. Mason, Tr. 838-39. Mr. Wegner stated that until the gathering of the complaints from employees was terminated, TVA would not be able to manage its

nuclear program to operating status. Mason, Tr. 839-40. Mr. Mason responded that he and Herbert Sanger viewed QTC's work for the OGC as satisfactory, and did not wish to see the contract terminated. Mr. Wegner replied that he would call Mr. Mason on January 13, 1986, when he and Mr. White expected to arrive at TVA. Mason, Tr. 842.

Mr. Wegner remembers the conversation differently.

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According to Mr. Wegner, Mr. Mason somehow approached him and gave him the impression that if "they" wanted to do something with QTC, Mr. Mason was in the position to do it. Wegner, Tr. 3314. Mr. Wegner remembers a second point made by Mr. Mason Mr. Wegner was told that if he wanted to do something with QTC he had to do it fairly soon, because the contract either had expired or was about to expire, and renewal of the contract was coming up shortly.

Mr. Mason's version of the conversation is the more likely one for at least three reasons. It is corroborated by the testimony of both the General Counsel and Richard Gutekunst, another attorney in OGC. Sanger, Tr. 56-57; Gutekunst, Tr. 159- 61. Mr. Mason's account is also corroborated by contemporaneous notes of Mr. Mason. CX-551, at 8-9. It is true as TVA argues, that these notes do not contain a reference to the gathering concerns. But it is not true that silence as to this particular fact makes the notes inconsistent with Mr. Mason's testimony Any narration is necessarily a selection, and the choice of particulars depends on the writer's primary interest at the time of the writing. At any rate, the notes confirm most of Mr. Mason's testimony, and are totally inconsistent with Mr. Wegner's account of the conversation. The third reason for accepting Mr. Mason's version of the conversation is that Mr. Wegner's version is inconsistent with the role played by Mr. Mason under the TVA- QTC contract, and with his relation to QTC. There is no need for record citations to support the proposition that Mr. Mason wanted QTC to work on I & R concerns for OGC, considered the quality of the work satisfactory, and even defended it against managers.

5. There is something else that Mr. Wegner told Mr. Mason at the airport. Mr. Wegner said that the first thing "SAW" (Steven A. White) would want to do when assuming command on January 13, 1986, was to terminate QTC. CX-560.

On January 14, 1986, Mr. W. Mason sent Mr. White a draft letter from Mr. White to Mr. Schum. CX-561. The transmitting memorandum referred to discussions concerning the draft letter that had taken place on January 13th and 14th, Mr. Mason had no recollection of the draft letter, but he recognized his handwriting on the memorandum and had no doubt that he had written it on January 14, 1986. Mason, Tr. 1463-64. Similarly, Mr. Sanger could not recall whether he discussed the

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QTC contract with Mr. White soon after the latter came to TVA. Sanger, Tr. 60-61. Mr. Sanger pointed out that the draft letter contained language he would not use. Mr. Sanger assumed that the letter had been drafted by the nuclear power people and sent to Mr. Mason for review. Sanger, Tr. 63-64.

The second paragraph of the draft letter stated that the sender of the letter (Mr. White) had spent considerable time studying TVA's nuclear operations, and had concluded that TVA's employee concern efforts were too dispersed, insufficiently focused on safety issues, and not appropriately integrated into the overall Office of Nuclear Power operations. Mr. White testified that he recalled having conversations with Mr. Sanger covering the subject matter of the January 14, 1986 memorandum; that he would assume that the conversations took place on January 13 and 14, 1986, although he had no recollection of the dates; that he did not give Mr. Sanger the information reflected in the second paragraph of the draft letter; and that the first or second day on the job he had not concluded anything about the employee concern program. White, Tr. 2248-49, 2253-54. Mr. White also testified that he took the draft letter and gave it to someone, probably Mr. Wegner. White, Tr. 2255-56. Mr. White had testified on direct examination that he received a call from Mr. Sanger, "out of the blue", offering to help Mr. White to get rid of QTC. White, Tr. 1939. Mr. White indicated to Mr. Sanger that he had no intention of getting rid of QTC. Ibid. On cross- examination Mr. White suggested that this phone call might be one of the conversations referred to in the memorandum of January 14 1986, transmitting the draft letter from him to QTC. White, Tr. 2256.

Mr. White's testimony that Mr. Sanger offered assistance to get rid of QTC bears a curious resemblance to Mr. wegner's testimony concerning the QTC conversation with Mr. W. Mason at the airport. I find it incredible because it is inconsistent with Mr. Sanger's attitude towards QTC. Although the testimony about the draft letter is not so positive as one would desire, it is clear to me that someone in Mr. White's office had contacted the Office of the General Counsel as early as January 13, 1986, concerning modification of the TVA-QTC contract. This fact is further support for Mr. Mason's version of his airport conversation with Mr. Wegner.

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6. On January 17, 1986, Mr. W. Mason attended a meeting in Mr. White's office in Chattanooga regarding the QTC contract. Mr. Mason testified that TVA chartered an airplane to fly him from Knoxville to Chattanooga due to the urgency of Mr. White's request. Mr. White at first testified he did not recall the meeting, but later admitted he had no reason to doubt that the meeting took place.

The meeting lasted the whole day, and the subject matter related to the need to protect QTC documents as the TVA-QTC contract was about to terminate; OGC's need of QTC services to complete investigation of the I&H concerns; and the quality of the QTC work. At the end of the meeting, Mr. Mason drafted a letter to QTC, at the direction of Mr. White. CX-262, at 1037. This draft was extensively revised before it was delivered to

Scott Schum on January 22, 1986, notifying him that QTC would no longer investigate safety-related employee concerns.

According to Mr. Mason, he and Mr. Wegner engaged in an animated discussion at that meeting. Mr. Wegner argued that TVA needed to get rid of QTC, the collector of problems, in order to get on with its nuclear program. Mason, Tr. 914. Mr. Wegner was opposed to QTC because it was not part of the group, it was beyond control, and communicated with people outside TVA. Mason, Tr. 920-21.

TVA contends that Mr. Wegner could not have attended a meeting with Mr. Mason on January 17, 1986, because Mr. Wegner left Chattanooga for Washington, D.C. before Mr. Mason arrived there. The contention rests on the testimony of Messrs. Wegner and Brodsky and on contemporaneous travel and expense records. See RX 152-54. Complainants have adduced affidavits of Messrs. Spivey, Evans, and Pillar for the propositions that there is no way to tell from a passenger coupon that the passenger took the flight indicated, or the identity of the driver who parked or removed a vehicle at Washington National Airport from a parking ticket.

It is common knowledge that a traveler may make reservations for a particular flight and use the ticket for a different flight. It is easily conceivable that a person may obtain a parking ticket and give it to another. But I do believe that possibilities of this sort deprive such records of all probative value, especially in view of the fact that it is also

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possible that contrary testimony may be mistaken. It would be unreasonable to reject the testimony of Messrs. Wegner and Brodksy together with the ordinary inferences to be drawn from travel and expense records on the basis of possibilities and uncertain testimony. For Mr. Mason candidly acknowledged that he could not say whether he heard certain statements of Mr. Wegner on January 3, or 17, or 24, 1986. *See* Mason, Tr. 915, 921, 922, 1669-70.

I conclude that Mr. Mason was mistaken in placing Mr. Wegner at the January 17, 1986 meeting in Chattanooga. Accordingly, the statements attributed to Mr. Wegner on that date are disregarded.

III

1. In order to appreciate the full import of the January 22, 1986 letter to Mr. Schum, it is necessary to keep certain facts clearly in mind. Contract No. TV-66317A (TVA-QTC contract provided that, when and as requested by the Director of NSRS, QTC was to develop and implement a program for the identification, investigation, and reporting of employee-raised issues of concern, with special emphasis on those issues dealing with nuclear safety, at TVA facilities. Paragraph 1.A.5 of the contract specifically provided that, upon request of the Director of NSRS, QTC would conduct investigations of the

issues of concern and provide TVA a full written report on the results of such investigations. *See* Statement of Agreed Facts, Exhibit 1. In fact, although during the first few months of work under the contract efforts were concentrated on interviewing employees and identifying concerns, QTC also conducted investigations of safety-related issues. The identification of issues logically preceded their investigation.

The Willis plan discussed at the December 17, 1985 meeting had two primary objectives: (1) to accelerate the completion of corrective actions without compromising the quality of investigative efforts; and (2) to place responsibility for the program on the Director of Watts Bar. *See* RX-29. The plan envisioned that the Management Review Group, of which Mr. Schum would be a member, would review the statement and classification of concerns; QTC would manage the investigation of the concerns then MRG would review investigation reports for adequacy, formulate corrective actions, and issue instructions to line

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management for implementation. The novelty for QTC was with respect to the reporting process. With respect to the work to be done, the plan represented a natural progression from identification to investigation of employee-raised concerns, as was contemplated in the original contract. In fact, if the parties had reached agreement on the proposal, the proposal would have been implemented by modifying the original contract.

The January 22, 1986 letter of Charles C. Mason to Scott Schum limited QTC activities under the contract to the maintenance of confidentiality for employee allegations and unspecified support for OGC investigations. QTC was excluded completely from investigations of safety concerns. Thus, the letter had the double effect of narrowing the scope of TVA-QTC contract and rejecting QTC's proposal of December 27, 1985, regarding the implementation of the Willis plan. As Mr. put it, upon the issuance of the January 22, letter, the QTC proposal became a moot point. White, Tr. 2584.

For purposes of Complainants' case, the January 22, 1986 letter was the crucial event. Subsequent contract negotiations related to the funding of QTC activities consistent with the limitations imposed by the letter. Thus, the question concerning discriminatory intent boils down to the question whether the January 22, 1986 letter was motivated in part by animus toward QTC for its protected activities, of which, of course, TVA was well aware.

2. I have concluded that Complainants have carried the burden of proving a *prima facie* case of discrimination. I have further concluded that TVA has failed to clearly set forth a legitimate, nondiscriminatory reason for its contract action.

The statements made by Mr. Wegner to Mr. W. Mason at the Knoxville airport regarding termination of the contract; the consultations that Mr. White had with the office

of the General Counsel on his first and second days in the position of Manager of the Office of Nuclear Power; the rapidity with which the TVA-QTC contract was restricted after January 13, 1986; and the drastic nature of the change from the Willis plan, all point to one conclusion. Mr. White and his team of advisors came to TVA with the set purpose to get rid of QTC. The animosity of TVA's managers against QTC for its collection of employee concerns and for disclosure of problems to members of NRC and Congress, the

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managers' expectations that Mr. White, upon assuming office, would do something about the QTC problem; Mr. Wegner's statements at the airport; the unilateral nature of the contract action, without any negotiations or consultation with QTC; and the laborious process of drafting what purported to be an ordinary business letter, certainly warrant the inference that the January 22, 1986 letter was prompted at least in part by discriminatory animus.

3. As for TVA's attempt to articulate a legitimate. business reason for its contract actions, the attempt fails because the evidence adduced for this purpose is uncertain, contradictory, or false. The Memorandum of Understanding signed January 3, 1986, gave Mr. White direct authority and responsibility for the management, control, and supervisor, of TVA's nuclear program. CX-508. The authority encompassed the power to hire, remove, assign, reassign, or direct any personnel supplied by outside contractors. *Id*. 22. Moreover, Mr. White, as Manager of Nuclear Power, was designated "TVA's principal spokesman on public information matters, using TVA's Information Office to facilitate the dissemination of information to the public in keeping with TVA's existing policies of providing information to the public, openly, promptly, and accurately on all nuclear power matters." *Ibid*. Mr. White was given nearly all he had demanded, absolute authority. White, Tr. 1899. In view of his position and far-reaching authority Mr. White was the logical person to give a clear, straightforward account of the decisions reflected in the letter of January 22, 1986. This he has failed to do.

I pass over the various explanations of TVA's contract actions given to the press at the time of the events. Mr. White testified that he could not recall whether he had seen the December 27, 1985 QTC proposal before 1988; he could not recall the specifics of the briefing given him by C.C. Mason; he had not, made a decision to reject the QTC proposal; and that Mr. Cottle had rejected the proposal before Mr. White arrived at TVA. White, Tr. 2282-87. Mr. Cottle denied that he had made the decision not to accept the QTC proposal. Cottle, Tr. 2815. He explained that in early January 1986 he and Mr. C. Mason were not ready to accept the proposal as submitted, but they were not comfortable or presumptuous enough to go ahead and make a final decision on the matter, knowing that Mr. White would soon arrive. Cottle, Tr. 2757.

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Mr. Charles Mason testified that his first impression was that the cost of the QTC proposal was extremely high, and that the completion date of June 1986 was questionable. Mason Depo., at 28-30. Mr. Mason further testified that he and Mr. Cottle decided to continue to explore the possibility of QTC conducting the investigations under the terms previously discussed, Mason Depo., at 23-27, 30-36. There were certain advantages, according to Mr. Mason, to having QTC under contract for the nuclear power. QTC had the unexpurgated files, and knew the details of the employee allegations; and QTC was the conduit for notifying the employee once his concern was investigated and corrective action taken. Mason Depo., at 30. Finally, Mr. Mason testified that he, Messrs. White and Cottle, and probably Mr. Denise, briefed Mr. White shortly after his arrival, and let him know that there was a proposal on the table that should have increased the efficiency in conducting the investigations, the cost, the completion date, and the general approach of the proposal. Mason Depo., at 38-41.

Mr. White also testified that Mr. Sanger volunteered his assistance in getting rid of QTC. I have already stated my reason for believing that this testimony is contrary to fact.

Mr. Wegner testified that, as advisor to Mr. White, he played no role in determining what should be done with respect to QTC contracts. Wegner, Tr. 3361. He admitted that QTC may have come up in casual conversations, but denied that he had played a role in developing a program to resolve employee concerns that had been elicited by QTC at Watts Bar. Wegner, Tr. 3361-62. However, Mr. Siskin testified that he would be very surprised if Mr. Wegner had not been involved in advising Mr. White about the January 22, 1986 letter. Siskin, Tr. 3980. Charles Mason testified that Mr. White decided to phase out QTC activities on the recommendation of his staff; that Messrs. Brodsky and Siskin were involved in the discussions of what should be done with the employee concern program; that Mr. Wegner was involved when the managers briefed discussions of what should be done with the employee concern program; that Mr. Wegner was involved when the managers briefed Mr. White; and that Mr. Wegner reviewed the letter of January 22, 1986 and concurred in it. Mason Depo., at 60-61. Strangely, Mr. Mason could not say why the letter was sent under his signature, although he had told Mr. Denise to write it. Id. at 60, 61-62.

Finally, the evidence fails to show how the cost

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calculations of Mr. Denise, the cursory review of Complainants' resumes by Mr. Brodsky, and the review of K-forms by Mr. Siskin entered into the decision-making process. For instance, it appears that Mr. Denise did not disclose his cost figures to Messrs. Brodsky and White until about January 28, 1986, when Mr. Brodsky requested the information for Mr. White who was in Washington, D.C. to explain his termination of the TVA-QTC contract. Denise, Tr. 3030-34; CX-287. Besides, at the hearing Mr. White stated that the cost of the QTC proposal was not a factor in his decision regarding the QTC contract. White, Tr. 2297. Again, Mr. Brodsky's opinion of Complainants,

qualifications for resolving hard engineering problems is irrelevant because, if the QTC proposal had been accepted, QTC would have hired additional investigators or even subcontractors. Schum Depo., at 143; Hill, Tr. 563. In fact, anything that took place after January 13, 1986 had no relation to the decision to narrow the scope of the TVA-QTC contract for a more general reason, because the decision had already been made by Mr. White and his advisors.

Reinstatement and Backpay

Complainants seek reinstatement to their former or comparable positions, as well as damages.

In my view, reinstatement is not a possible remedy under the circumstances of this case. Complainants were employees of QTC, and were employed to work under its contract with TVA. Complainants are not entitled to reinstatement because QTC is not a party to this case, and because its contract with TVA would have terminated by now in any event.

With regard to the backpay element of damages, Complainants contend that TVA must compensate them for all the wages they have lost as a result of TVA's narrowing and termination of the QTC contract, for the period from the date of the termination of their employment to the date the order is entered in this case. I agree that the purpose of a backpay award is to make a complainant whole, to place him in the position he would have been in but for the discrimination. But in this case, that purpose would be satisfied if the loss of earnings is computed from the termination of each Complainant's work for QTC at TVA to June 15, 1986, when QTC proposed to complete the investigation of the safety complaints. TVA's wrongdoing consisted in failing,

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for an unlawful reason, to request additional services under a contract that was to expire in April 1986, and to accept the QTC proposal of December 27, 1985 to complete safety-related investigations by June 15, 1986. But for the discrimination, Complainants might have continued to work at TVA until this date. What would have happened afterwards is mere speculation.

Conclusions

By reason of the foregoing, I find (1) that TVA restricted the TVA-QTC contract of April 26, 1985, and refused to accept the QTC proposal of December 27, 1985, in retaliation for QTC'S collection, investigation, and disclosure of safety-related problems, in violation of Section 210 of the Energy Reorganization Act of 1974; (2) that as a result of TVA's unlawful conduct Complainants suffered a loss of earnings from the date of the termination of their work at TVA to June 15, 1986; and (3) that Complainants, complaint

was untimely filed. Accordingly, I recommend that the complaint in this case be dismissed.

Recommended Order

The complaint of Charles Hill, et alii is dismissed.

NICODEMO DE GREGORIO
Administrative Law Judge

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